expecting the defendant to move over - until the danger built up and they were 30 or 40 feet apart. Faced with their self created emergency the plaintiff decided to swerve to the right and in the event the left front of the car collided into the left rear of the motorcycle and then the defendant went over to the other side of the road.

In *Goh Beng Seng v. Dol Bin Dolah* [1970] 2 MLJ 95, Sharma J. said at p. 97:

> There can be no territorial or geometrical division of the road. The centre line remains a guide and a reminder only. One's duty is to ensure safety for oneself and for others. The attitude of mind that because the driver coming from the opposite direction is encroaching a few inches of my side of the road, I can treat him as a trespasser and proceed on my half of the road as if it was my exclusive domain and that I am totally immune from liability if I drive within the exact limits of that "realm" even though I know that an accident may thereby happen on my side of the road, is the attitude of an irresponsible and an irrational being. I owe a duty to others on the road just as others owe a duty to me.

This *dictum* of Sharma J. was followed by L.C. Vohrah J. in *Kasirin bin Kasmani v. The Official Administrator & Anor*. [1991] 3 CLJ 2498 and likewise I respectfully accept it.

Accordingly I find the plaintiff and the defendant equally liable in negligence for the accident.

CHE WAN DEVELOPMENT SDN. BHD

v.

CO-OPERATIVE CENTRAL BANK BHD.

HIGH COURT, KUALA LUMPUR
DATO' N.H. CHAN J.
[ORIGINATING SUMMONS
NO. S5-31-3640-88]
19 FEBRUARY 1993

PRACTICE & PROCEDURE: Taxed costs - Paid by defendant to plaintiff - Receivers of defendant requesting repayment of moneys paid - Plaintiff making application to amend order - Whether application necessary - Whether receivers entitled to repayment.

The plaintiff brought an action against the defendant which culminated in judgment for the plaintiff with costs. During the course of the action the defendant was placed under receivership and the receivers took over conduct of the case on behalf of the defendant. The costs were in fact paid by the receivers but they subsequently requested the plaintiff to return the money.

The plaintiff applied to amend the order for costs so as "to reflect the true intention of the Court" that it was the receivers who were to pay the costs.

Held:

[1] The rule is that the costs of unsuccessful litigation incurred by a liquidator are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation and the rule applies even though the order simply directs payment of costs.

[2] The full taxed costs of the unsuccessful litigation by the receivers have been paid to the party entitled, which is the plaintiff and they cannot be repaid.

[3] The receivers are entitled by regulation 13(1) of the Essential (Protection of Depositors) Regulations 1986 to recoup themselves out of the assets of the defendant in priority to all other claims.

[Order accordingly. Costs to the plaintiff].

Cases referred to:

In re Pacific Coast Syndicate Ltd [1913] 2 Ch 26 ***(refd)***
In re Home Investment Society [1880] 14 Ch D 167 ***(foll)***
In re London Metallurgical Company [1895] 1 Ch 758 ***(foll)***

*Ex parte Smith, Law Rep 3 Ch 125 at 129 - 130 (**refd**)*
*Zainal Abidin Putih & Anor. v. Che Wan Development Sdn. Bhd. [1992] 2 MLJ 233 / [1992] 3 CLJ 1539 (**dist**)*

Legislation referred to:
Companies Act 1862, s. 144 (UK)
Essential (Protection of Depositors) Regulations 1986, reg. 13(1)(2)

Other sources referred to:
Atkin's Court Forms (2nd ed.) vol. 33 [1988 issue] at p. 176, para. 21/[1989 issue] pg. 174, para 20

For the plaintiff / applicant - Hira Singh; M/s. Asbir Hira Singh & Co.
For the defendant / respondent - Cecil Abraham (S. Suhendran with him); Saheran & Woon

JUDGMENT

N.H. Chan J:
The plaintiff Che Wan Development Sdn. Bhd. filed this originating summons against the defendant Co-operative Central Bank Bhd. on 24 November 1988. At first, the defendant was represented by its own lawyers. During the course of the proceedings, the defendant was placed under receivership and thereafter the receivers took over the conduct of the defence of the action.

On 24 April 1989, the action ended in the plaintiff's favour with costs to the plaintiff (See [1990] 2 CLJ 35). Apparently the costs were paid to the plaintiff by the receivers on 11 February 1991. But now the receivers want the money back; see the letter from the receivers' solicitors dated 27 May 1992. Hence, this application by the plaintiff to me (as the Judge who had ordered the costs against the defendant) for leave to amend my order for costs so as "to reflect the true intention of the Court", to use the words in the summons in chambers. I do not think it is necessary for me to add to or vary the order for costs which I have given. This is what I said when granting costs: "Costs on party to (sic) party basis to the plaintiff". Of course, the phrase should read "party and party" but I think my secretary was trying to correct my English without realising that the phrase is a term of art used by lawyers. The words in the sealed order of 24 April 1989 are explicit enough. They accurately set out what I have said on costs being awarded to the winning party. It reads:

> It is lastly ordered that the defendant do pay the plaintiff the costs of this application to be taxed by a proper officer of the Court.

I refer to this passage in **Atkin's Court Forms** (2nd ed.) vol. 33 [1988 issue] on Receivers, where it says at p. 176, para. 21:

> The costs of unsuccessful litigation incurred by a receiver will probably be payable to the party entitled, in priority to the receiver's claims for costs, charges and expenses: *In re Pacific Coast Syndicate Ltd.* [1913] 2 Ch 26.

In the case of *In re Pacific Coast Syndicate Ltd* [1913] 2 Ch 26, the headnote reads:

> Costs of unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding-up, are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. This rule applies whether the order simply directs payment of costs, or directs that the costs be paid out of the assets of the company, or that the liquidator do pay the costs with liberty to recoup himself out of the assets.

Neville J. in his judgment at pp. 28, 29 said:

> Here the liquidator had moneys in his hands which would now have been applicable to the payment of the taxed costs of the applicants had he not applied them in payment of his own solicitors' costs which were subject to the prior claim of the applicants. I hold, therefore, that he must pay the applicants their taxed costs of the action and he may repay himself out of any further assets that may come to his hands.

It was held in *In re Home Investment Society* [1880] 14 Ch D 167, and I read from the headnote, that:

> Where an official liquidator has failed on a summons to recover money for the company, and has been ordered to pay the costs of the summons out of the assets of the company, these costs will be paid out of the assets in priority to the costs of the winding-up.

This is what Malins VC said at p. 168:

> I confess I am surprised at the length of the argument upon this question, which seems to me to be settled, not only by authority, but on every possible principle.

He went on to say at 169, 170:

> Mr. Brabant has been put to the expense of more than £100 on the summons, and, there being a deficiency of assets, it is now said that, instead of being paid his costs out of the assets of the company, he is only to be paid his costs after the official liquidator has been paid all his costs, the consequence of which would be that Mr. Brabant would never get a penny. Is that justice? Is there any principle

in that? Is there any sense in it? I can only say that I think it is contrary to every principle of common sense, and contrary to every principle of justice, and, fortunately, is contrary to the decided cases.

What does principle point out under such circumstances? The official liquidator chooses, properly or improperly, to enter into litigation with a person whom he thinks liable to pay a sum of money to the company. There turns out to be no liability. What does justice require? That the person who has been put to expense should recover his expenses, and that he should have them out of the assets of the company. It is not asked that the official liquidator should personally pay, but that he should pay out of the assets of the company. Then Mr. Higgins (for the liquidator) seriously referred to the 144th section of the Companies Act of 1862 as conclusive upon the subject. Now, what is the 144th section? "All costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims". But that must mean in priority to all claims upon the company when the order to wind up was made, and no others, and it has nothing to do with the question. This was not a liability of the company when the order was made, but a liability incurred by the official liquidator in an unsuccessful litigation with a third party.

And the Vice-Chancellor, after referring to the authorities, concluded thus (at 170):

Therefore, upon the authorities of those cases also, Mr. Brabant must be paid out of the assets all the costs to which he has been improperly put by adverse litigation, in priority over the official liquidator, who has entered into this litigation at his own peril, and the order will be as asked for.

Section 144 of the English Companies Act of 1862 reminds us of regulation 13(1) of our Essential (Protection of Depositors) Regulations 1986 which is similarly worded. It reads:

13(1) All proper costs, charges and expenses, including remuneration, of receivers ... shall be payable out of the assets of the deposit-taker in priority to all other claims.

And to borrow from the words of Malins VC above, "that must mean in priority to all claims upon the company when the order" appointing the receivers "was made". The costs of adverse litigation in the instant case "was not a liability of the company when the order was made, but a liability incurred by the" receivers "in an unsuccessful litigation with" the plaintiff.

Had the receivers not entered upon the litigation but instead had allowed the plaintiff to proceed against the company without the receivers' intervention, the rule that the costs of the adverse litigation by the receivers would be paid out of the assets in priority to the costs of the receivers would not have applied.

On the other hand, had the directors of the company wanted to defend the action, they would have to persuade the receivers to enter upon the litigation, in which case, the receivers would most certainly require an indemnity from the directors for their costs in the event that the litigation was unsuccessful. This is because the receivers would lose their priority to be paid out of the assets to the successful litigant.

In *re London Metallurgical Company* [1895] 1 Ch 758, Vaughan Williams J. summarised the principles on which the Court proceeds in these matters. He said, at 763:

Before dealing with this particular application on its merits I will endeavour to state the principles on which the Court proceeds in these matters. Some rule of practice ought to be laid down, as the question frequently arises how the costs of a person successfully litigating with the liquidator of a company ought to be dealt with.

It was at one time contended that the terms of the Companies Act 1862 were such that a successful litigant in proceedings with the liquidator, or with the company through its liquidators, or with the company after liquidation had begun, must come in and prove in respect of his claim *pari passu* with the creditors of the company who were such at the date of order for winding up. But that contention was disposed of by Vice-Chancellor Malins in *In re Home Investment Society* 14 Ch D 167. I start, therefore, with the proposition that successful litigants, and other persons who become creditors of the company after the winding-up order, are *prima facie* entitled to be paid in full, and I do not understand that is disputed by Mr. Ashton Cross. Thus two steps have been taken in the line of reasoning -

(1) that successful litigants are not to be placed in competition with the creditors who were such at the time of the winding up; and
(2) that *prima facie* they have a right to be paid in full.

> Questions of priority may arise, but they will only be of importance where there is a deficiency in the assets, and not where everybody can be paid in full. Then out of what are the successful litigants to be paid? They are to be paid out of the assets of the company. That is the general rule, though under exceptional circumstances an order may be made going beyond that and giving them the right to be paid by the liquidator personally.

And at 764 he discussed the authorities for the rule thus:

> Lord Cairns in *Ex parte* Smith, Law Rep 3 Ch 125 (which Mr. Ashton Cross says has been misunderstood) decided at least this, that a successful litigant in proceedings commenced after the winding-up order has a right to be paid in priority to the general costs of the liquidation. To my mind that is laid down in the plainest possible manner by Lord Cairns, and subsequent cases recognise that he did so. The proposition that a successful litigant is entitled to be paid in priority to the general costs of the liquidation was affirmed in *In re Home Investment Society*, 14 Ch D 167, and also in *In re Dominion of Canada Plumbago Company*, *27 Ch D 33* - certainly by Mr. Justice Pearson, and as I read it by the Court of Appeal also.
>
> I am concerned here to shew that by a long and uninterrupted stream of authority a successful litigant has been held to be entitled to be paid his costs in priority to the general costs of the liquidation, and that being so I will not at the present moment consider what particular costs come before, or rank *pari passu* with his costs. Assuming for the moment that there are such costs, what are the rights of the successful litigant, and is he entitled to immediate payment? *Prima facie,* he is. If the estate is solvent, in practice he obtains immediate payment, although that does not shew that he has a right to it. I cannot understand why he should not have the right to immediate payment. If the estate is insolvent, there must necessarily be an abatement; but until insolvency is shewn the right of the successful litigant is to be paid in full.

If the rule were otherwise, the receivers would be at liberty to bring groundless actions or defend the undefendable.

> The consequences ... would be that a liquidator, being armed with powers to bring whatever actions he thinks fit, might bring any number of groundless actions, which would be defeated one after another, and judgment would go for the defendant, and yet the defendant, when he came to levy for his costs by virtue of his judgment, would be told that his execution was void, and that he must go in and take the chance of obtaining a dividend under the process of winding-up.
>
> - per Lord Cairns in *Ex parte Smith*, Law Rep 3 Ch 125 at 129 - 130.

In the instant case, my order simply directs payment of costs to the plaintiff, just as it was done in the *Pacific Coast* case (see at p. 26 of the report where it says, "judgment was entered for the defendant company with costs"). But the rule is that the costs of unsuccessful litigation incurred by a liquidator are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation; and the rule applies even though the order simply directs payment of costs: *In re Pacific Coast Syndicate Ltd.* [1913] 2 Ch 26. *A fortiori,* I see no reason why this rule should not, as much, apply to a receiver. In this respect, I am fortified by the view expressed in **Atkin's Court Forms** (2nd ed) vol. 33 at p. 176, para. 21, in the passage which I have quoted at the beginning of this judgment.

In the instant case, the full taxed costs of the unsuccessful litigation by the receivers have been paid to the party entitled, which is the plaintiff and they cannot be repaid. However, the receivers have nothing to worry about as they are entitled by regulation 13(1) of the Essential (Protection of Depositors) Regulations 1986 to recoup themselves out of the assets of Co-operative Central Bank in priority to all other claims. The relevant part of regulation 13(1) which applies to the receivers in the present context is as follows:

> 13(1) All proper costs, charges and expenses, including remuneration of receivers ... shall be payable out of the assets of the deposit-taker in priority to all other claims.

Finally, I must say a few words on *Zainal Abidin Putih & Anor. v. Che Wan Development Sdn. Bhd.* [1992] 2 MLJ 233 as Mr. Cecil Abraham has relied on it. There Che Wan Development had commenced an action by originating summons against the receivers of Co-operative Central Bank for the following orders:

> (1) The defendants are liable to pay the costs taxed by the senior assistant registrar on 28 November 1990 pursuant to the order of the learned Judge dated 24 April 1989

in Kuala Lumpur High Court originating summons No. S5-31-3640-1988.

(2) The aforesaid costs be paid by the defendants out of the funds of the Co-operative Central Bank Bhd. forthwith ...

The Judge who heard that action granted the order sought and the receivers appealed to the Supreme Court which allowed the appeal. Gunn Chit Tuan SCJ (as he was then), in delivering the judgment of the Court, said at 241:

> But the important point in this case was that as the appellants are officers of the Court, leave of the Court should have been obtained to proceed against them ...

There, the Supreme Court held that the action against the receivers was not maintainable. This is what **Atkin's Court Forms** (2nd ed) vol. 33 [1989 issue] on Receivers at p. 174, para 20 has to say:

> 20 Proceedings by and against receivers.
>
> ...
>
> (at p. 175) Neither the party at whose instance a receiver was appointed nor any third party: *Searle v. Choat* [1884] 24 Ch D 723, can institute an action against him while he is in office without the leave of the Court ...

Actually, I cannot see how Che Wan Development can bring a separate action to recover the costs that I have awarded to the successful party in the present action although they can levy execution on it. To make matters worse, they have sued people who were not parties to the action in which the costs were awarded. Further, costs awarded in an action cannot *per se* be a cause of action in a separate action, unless one is thinking of an assignment by the successful party in litigation of the costs awarded to him to a third party. But then, the cause of action is founded on assignment and not for the costs to be paid.

I am digressing. To return to *Zainal Abidin v. Ch Wan Development*, the Supreme Court also held that regulation 13(1) of the Essential (Protection of Depositors) Regulations 1986 only gave priority to the costs of the receivers and other persons appointed under the regulations and did not give priority to the other expenses, which did not include costs, of the deposit-taker; see headnote [1992] 2 MLJ 233, Held (2).

In other words, the Court held that the provisions found in regulation 13(1) are only applicable to the receivers and other persons appointed under the regulations but they are not applicable to the deposit-taker.

Mr. Hira Singh's argument appears to be to this effect; see at 241. Regulation 13(1) says:

> 13(1) All proper costs, charges and expenses ... of receivers ... shall be payable out of the assets of the deposit-taker in priority to all other claims.
>
> 13(2) The proper costs, charges and expenses ... referred to in paragraph (1) shall include the following ...
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) all other expenses necessarily incurred ... by the deposit-taker ...

Therefore, Mr. Hira Singh's argument appears to be this: since regulation 13(2) says that the proper costs, charges and expenses referred to in paragraph (1) shall include "(d) all other expenses necessarily incurred by the deposit-taker", then regulation 13(1) must apply to the deposit-taker as well.

This is how Gunn Chit Tuan SCJ dealt with the argument. He said (at 241):

> We have noted that although the said regulation has stated that the proper costs etc. shall include "all other expenses necessarily incurred, we consider that as the expressions "costs" and "all other expenses" are used in the same regulation, it is clear that the expression "all other expenses" cannot therefore include or mean "costs".

However, that is not the situation in the instant case. In this judgment I am not saying that the deposit-taker, i.e. Co-operative Central Bank, is entitled to the same priority as the receivers under regulation 13. Nor am I saying that the successful litigant is entitled to priority for his costs under the said regulation.

In any case, I am unable to fathom why Mr. Hira Singh had to resort to this argument. It was not claimed in Che Wan Development's originating summons that the deposit-taker, i.e. Co-operative Central Bank, had priority for its costs under regulation 13. His claim was against the receivers of Co-operative Central

Bank to pay the taxed costs in the present action out of the assets of Co-operative Central Bank. That being the case, the decision of the Supreme Court on regulation 13 is, at best, *obiter dicta* as their observations on the said regulation was not necessary to their decision to dismiss the claim of Che Wan Development against the receivers.

Also, since there was no claim against the receivers to pay the costs personally, as the claim was for the costs to be paid out of the funds of Co-operative Central Bank, the following remarks (at p. 242) that:

> Therefore it was not the appellants, as receivers, who had by their misconduct made any unnecessary application to the Court for the Court to exercise its discretion to make an adverse order against them.

were unnecessary to the decision, and are *obiter*.
Similarly, the following remarks (at 243) that:

> ... the taxed costs is part of a judgment debt which therefore can only rank *pari passu* with other unsecured liabilities.

are also *obiter*. The claim in that originating summons was not a claim for priority to be paid the taxed costs in competition with the receivers' claim for priority under regulation 13. The issue whether the costs of the successful litigant are to rank *pari passu* with other unsecured creditors did not arise in that action.

The present application by summons is in effect a request by the plaintiff for clarification of my order for costs and my explanation is given above.

Since the taxed costs have already been paid to the successful litigant, it becomes unnecessary in the instant case to make any direction on its payment. The application would not have been necessary had not the receivers applied to the plaintiff for the costs to be repaid to them. Therefore costs should follow the event.

Costs to the applicant.

JOSEPH AU KONG WENG

v.

BAR COUNCIL, STATES OF MALAYA & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HJ. MOHD. EUSOFF B. CHIN J.
[ORIGINATING SUMMONS NO. R8-177-9-1989]
20 MARCH 1992

LEGAL PROFESSION: Disciplinary proceedings - Provisions as to time in ss. 98 & 99 Legal Profession Act 1976 - Whether directory or mandatory - Non-compliance with time limits - Effect.

The Bar Council made a complaint against the plaintiff and his partner with respect to mismanagement of the Trust Account of M/s. Malek & Joseph Au. The complaint was referred to the State Bar Committee which forwarded its report and recomendation to the Bar Council on 3 July 1988.

Under s.98 of the Legal Profession Act 1976 (the Act) the Bar Council is given six weeks after receipt of the report from the State Bar Committee to determine if a formal inquiry into a complaint was necessary and if so is required to apply forthwith to the Chief Justice for the appointment of a Disciplinary Committee. The Bar Council applied for the appointment of a Disciplinary Committee on 26 October 1988, some 12 days out of time.

The question put to the Court was whether the time frames enacted by ss.98 & 99 of the Act are mandatory or directory.

Held:

[1] The intention of the Act is quite clear in that when it comes to disciplining an advocate and solicitor, the required actions to be taken must be done within the time frames provided for by the Act. The time frames are mandatory and failure to comply with them will render the exercise of disciplinary action invalid, null and void.

[2] The Bar Council's application to the Chief Justice for the appointment of a Disciplinary Committee was made after the expiry of the six weeks prescribed by s.98 of the Act and the subsequent appointment of the Disciplinary Committee was invalid, null and void.

[Orders accordingly. Costs to the plaintiff].